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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. ....73 - 1994

JULIAN VELLA,

Petitioner,

vs

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals entered on April 8, 1974 affirming in part and reversing in part the Opinion and Order of the District Court for the Eastern District of Michigan, Southern Division, with mandate for entry of Order of Dismissal is not yet reported. The Opinion of the District Court denying respondent's Motion for Judgment Non Obstante Verdicto was delivered from the bench on July 17, 1972 and is unpublished.

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming in part and reversing in part with mandate for entry of Order of Dismissal was filed on April 8, 1974. The Order of the District Court pursuant to mandate of the Sixth Circuit Court of Appeals was entered on May 7, 1974.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTES AND TREATIES INVOLVED

The case involves 54 Stat. 1936, Article 4, Paragraph 1:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character."

Also involved is the Jones Act, 46 USC §688 et seq:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

QUESTIONS PRESENTED

I

IS A DISABLED SEAMAN WHO CONTRACTED BY TRAUMA A PERMANENT DISEASE WHILE IN THE SERVICE OF A VESSEL ENTITLED TO MAINTENANCE AND CURE PAYMENTS DURING THE INTERUM BETWEEN THE PERIOD THE INCIDENT OCCURRED AND THE TIME THE DISEASE WAS MEDICALLY DIAGNOSED AND PROCLAIMED INCURABLE?

II

(a) WHERE A CREWMAN SUFFERED AN INJURY FROM A FALL CAUSED IN PART BY AN UNSAFE PLACE TO WORK, IS A JURY INSTRUCTION OF SOLE FAULT OF THE INJURED SEAMAN IMPROPER?

(b) WOULD THE FACT THAT THE SEAMAN BY JOB DESCRIPTION WAS OBLIGED TO KEEP THE PLACE SAFE DENY THE SEAMAN OF THE LIABILITY DOCTRINE OF WARRANTY OF A SEAWORTHY VESSEL?

STATEMENT OF THE CASE

Petitioner, a seaman, was injured during a fall in the engine room of the SS Robert McNamara while in the service of the ship. Thereafter suit was instituted in the United States District Court for the Eastern District of Michigan, Southern Division with counts under the Jones Act, 46 USC §688 et seq., unseaworthiness under the General Maritime Law and for maintenance and cure.

Petitioner, an engine department crewman, was injured while in the process of replacing a steel deck plate in the engine room when he slipped on oil which had accumulated from leaks of machinery.

Over petitioner's objection, the trial court gave a sole fault contributory negligence charge, and the jury found adversely to plaintiff on his liability claims under the Jones Act and for unseaworthiness of the vessel. The jury found the accident occurred, resulting from the sole fault of the seaman and awarded maintenance and cure from June 29, 1968 through June 29, 1970.

Judgments on the verdicts were entered pronouncing no cause for action under the Jones Act and for unseaworthiness of the vessel; judgment for the plaintiff for maintenance and cure payments for two years.

Respondent shipowner moved for judgment non obstante verdicto relative to the maintenance and cure award whereupon the trial court denied the motion.

Petitioner appealed to the Sixth Circuit Court of Appeals on the single issue presented for review regarding the question of petitioner being the sole cause of his injury, whereupon the Circuit Court affirmed the trial court.

Respondent appealed to the Sixth Circuit Court of Appeals from the Order of the trial court denying its motion for judgment non obstante verdicto as to the maintenance and cure award, whereupon the Circuit Court of Appeals reversed the trial court, remanding the action for entry of an order of dismissal.

ARGUMENT

I

MAINTENANCE AND CURE

The Sixth Circuit Court of Appeals found that petitioner's vestibular disorder was of a permanent nature ab initio upon the occurrence of the accident and grounded

its findings on the testimony of the shipowner's witness-physician, Edward Richard Heil, an otolaryngologist, who alone made that pronouncement at the time of trial. The specialist in behalf of the shipowner had examined petitioner on March 20, 1972. The jury awarded maintenance and cure from June 29, 1968 to June 20, 1970.

Since the trial court held that the only physician competent to testify as to the permanency of this seaman's vestibular disorder was the otolaryngologist, the earliest possible point in time that petitioner's disorder could have been declared permanent was on the date of examination by Dr. Heil; all physicians conducting prior examinations failed to diagnose the disorder.

The holding of the Appeal Court was that even though petitioner's injury was not declared permanent until 1972, the seaman was not entitled to maintenance and cure in any amount whatsoever. That holding contravenes the very purpose of providing for maintenance and cure to an injured seaman.

In 1936, the General Conference of the International Labor Organization meeting at Geneva submitted a draft convention to the United States which was subsequently ratified by the Senate of the United States and proclaimed effective by our President on October 29, 1939. It provides in relevant parts as follows:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been *declared of a permanent character.*" 54 Stat. 1965. Article 4, paragraph 1. (Emphasis ours)

Patently, the holding of the Sixth Circuit in this case is contrary to the said treaty of the United States of America. Moreover, this Court in *Farrell* v *United States,* et al, 336 US 511, 517 (1949) indicated with approval that the treaty was ". . . in accordance with the understanding of those familiar with the laws of the sea and sympathetic with the seaman's problems;" and further stated that the Department of Labor possessed similar understanding of this traditional limitation on maintenance and cure.

The Sixth Circuit decision is in conflict with the policy of the United States Department of Labor, the aforestated treaty and the decision of this court in *Farrell.*

Furthermore, the Sixth Circuit held that where a disability is permanent necessitating medical care, even if the seaman's condition medically may be helped by treatment for the symptoms of the disability, the seaman nevertheless would not qualify for maintenance and cure. The Circuits are in conflict as to that issue.

In *Ward* v *Union Barge Line Corporation,* 443 F2d 565 (3rd Cir 1971), the Third Circuit stated that the declaration of permanency limitation ". . . has been interpreted in this Court to extend the obligation where medical care is needed to arrest further progress of the disease or to relieve pain", *Ward, supra,* at 572 (Citations omitted).

The Sixth Circuit indicated awareness of the Third Circuit's interpretation yet held though medical treatment would relieve the symptomatic disability aspect of the disease, maintenance and cure should not be awarded. Thus, the Sixth Circuit's holding in the case at bench regarding the payment of maintenance and cure where a disability is permanent though symptomatically treatable is in con-

flict with the Third Circuit indicating that the grant of writ of certiorari would be of sound judicial discretion as affecting, potentially, rights of all American seaman relative to the stated issue.

II

SOLE FAULT

At issue, further, is whether the trial court inappropriately gave a sole fault jury instruction pertaining to acts of the seaman when he suffered a traumatic injury whereby cause-in-fact contributing to the traumatic incident resulted under conditions patently constituting an unsafe place to work.

The Appeal Court conceded inferentially existence of a classic unseaworthy condition relative to the incident leading to the traumatic injury where the Court embodied in its opinion:

> "The plaintiff was an oiler on the 'McNamara' and was responsible for keeping the area near certain moving machinery free from oil. There was evidence that it was his responsibility to remove the very oil upon which he slipped." 4a, 5a

Oil about a seaman's footing is a most classical instance of unseaworthiness. Slipping on oil in carrying out a task is a condition contributing to the incident of fall; although plaintiff could have been contributorily negligent, his injury was not exclusively the result of his "own hands," which is a required element within the fact situation to uphold a sole cause charge, *Donovan* v *Esso Shipping Co.,* 259 F2d 65 (3rd Cir. 1958); *Keel* v *Greenville Mid-Stream Service, Inc. and M/V Ark City,* 321 F2d 903 (5th Cir. 1963).

The reasoning of the Court of Appeals would appear to suggest that where a seaman's task within his job description is to perform acts to rectify an unseaworthy condition of a ship, and sustains injury caused at least in part by that very unseaworthy condition of the vessel, the seaman may not take benefit of the age-old maritime doctrine of warranty of seaworthiness of the vessel.

The doctrine of comparative fault is the appropriate instruction to the jury in the multitude of cases similar to the instant case and therefore granting of a writ of certiorari would be of sound judicial discretion as affecting, potentially, rights of all American seaman relative to this specific issue.

CONCLUSION

In conclusion petitioner prays that this court shall grant his petition for writ of certiorari to the United States Sixth Circuit Court of Appeals on each of the issues presented for the reasons herein stated.

Respectfully submitted,
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APPENDIX OF OPINIONS
[OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS DATED AND FILED ON APRIL 8, 1974]

Before: MILLER, LIVELY and ENGEL, Circuit Judges.

Per Curiam. The plaintiff, a seaman, alleged in his complaint that he suffered an injury while in the service of his ship. He brought the present action against the shipowner for damages and maintenance and cure. Jurisdiction in the district court was founded on the Jones Act, 46 U.S.C. Sec. 688 et seq., and the general maritime law of the United States. The jury found that plaintiff was entitled to a limited award of maintenance and cure but denied recovery for damages. Both parties appeal.

The plaintiff was an oiler aboard the S/S "Robert S. McNAMARA". He alleges that in April of 1968, while replacing a lower engine room deck plate, he slipped and fell on the oily floor plate, causing his head to strike an electrical box. There is some doubt as to whether plaintiff reported the accident immediately after it occurred. In June of 1968 plaintiff was discharged from the vessel for failure to follow the orders of a superior officer. At that time the third assistant engineer prepared the discharge papers. He was then informed by plaintiff of the accident that had occurred in April. Plaintiff requested, and was given, a master's cerificate which permitted him to go to the U. S. Public Health Hospital in Detroit. Immediately upon leaving the vessel, plaintiff was examined at defendant's plant hospital and was declared "able to work". Subsequently, he was examined on three occasions at the Public Health Service Hospital. After each visit, he was prounced (sic) "fit for duty."

Plaintiff complained that after the accident he suffered from headaches and dizzy spells. At trial, Dr. Berke, a neurosurgeon, testified that he was unable to find any objective evidence of neurological damage. He did observe that when plaintiff stood with his eyes closed, he could not maintain "complete and perfect" balance. This difficulty suggested to Dr. Berke that plaintiff was suffering from a vestibular disorder—damage to the balancing mechanism of the inner ear. Dr. Heil, an otolaryngologist, testified that as a result of an electronystagmographic test, he concluded that the plaintiff had a vestibular disorder of the left ear. He stated that he was somewhat puzzled by the results of the test because the report of an earlier examination, by a doctor who did not testify at the trial, showed that a similar test had disclosed a vestibular disorder of the *right* ear. Dr. Heil was unable to offer any explanation for the discrepancy.

The jury found that the plaintiff was entitled to maintenance and cure from June 29, 1968, the date of his discharge, until June 29, 1970. Under the maritime law of the United States, a shipowner is liable to a seaman for maintenance and cure, regardless of the negligence of either party, if the seaman is injured while in the service of the ship. *Aquilar* v. *Standard Oil Co.,* 318 U.S. 724 (1943). The duty of the shipowner to maintain and care for the seaman exists only until the seaman is cured to the maximum extent medically possible. *Farrell* v. *United States,* 336 U.S. 511, 518 (1949). In brief, once the seaman reaches "maximum medical recovery", the shipowner's obligation to provide maintenance and cure ceases. *Vaughan* v. *Atkinson,* 369 U.S. 527, 531 (1962).

The defendant contends that the plaintiff's injury was

permanent from the date of the accident and was never susceptible of curative treatment. Dr. Heil testified that although he could not determine from his examination what had caused the vestibular disorder, a severe blow to the head could have caused this problem. Presumably, the jury concluded that it was plaintiff's fall that caused the disorder and the disabling dizziness and headaches. However, the evidence clearly shows that a vestibular disorder is not a condition that can be cured or improved by treatment. When asked whether plaintiff might be cured by treament, Dr. Heil testified:

> No, not really. Treatment is primarily symptomatic for this condition. That is, people with a vestibular disorder are apt to have intermittent episodes of dizziness which, on occasion, are somewhat more severe. Treatment is limited to those times when the patient is particularly dizzy. They can obtain some symptomatic relief with medication. Other than that, there is no specific cure or treatment.

No evidence was introduced in conflict with this conclusion of Dr. Heil.

The record in this case does not permit an inference other than that plaintiff's condition was permanent immediately after the accident. It is not even alleged that plaintiff has ever received treatment for the condition itself, although he has received medicine for the symptoms of dizziness and headaches. That one may require or be helped by treatment for the symptoms of a disorder does not qualify him for maintenance and cure. *Farrell* v. *United States, supra* at 519. We find that the jury award

of maintenance and cure is without material support in the record.[1]

When the jury returned its verdict, the foreman stated that the jury had found no cause of action for either negligence or unseaworthiness because it believed that the accident "was due to the sole negligence of the plaintiff, Julian Vella." Plaintiff contends that the jury's findings on negligence and unseaworthiness were caused, at least in part, by the following instruction:

> [I]f you find the plaintiff was guilty of contributory negligence and that such contributory negligence was the sole cause of his injuries, you must return a verdict for the defendant.

Plaintiff alleges that the trial court committed reversible error in giving this instruction because there was no evidence that the accident was caused solely by the acts of the plaintiff.

As an abstract statement of law, plaintiff is correct when he asserts that an instruction on sole cause is improper if there is no evidence to support such a finding by the jury. *See McCarthy* v *Pennsylvania Ry. Co.*, 156 F2d 877 (7th Cir. 1946). In the present case, however, there was sufficient evidence to support the charge and the jury's conclusions. **The plaintiff was an oiler on the** "McNAMARA" and was responsible for keeping the area near certain moving machinery free from oil. There was evidence that it was his responsibility to remove the very

[1] We are aware that the Third Circuit has taken a very liberal view as to when maintenance and cure may be awarded. *See Ward* v. *Union Barge Line Corp.*, 443 F2d 565 (3rd Cir. 1971). This is definitely a minority position and is difficult to square with *Farrell* v. *United States*, 336 U.S. 511 (1949). *See Berke* v. *Lehigh Marine Disposal Corp.*, 435 F.2d 1073, 1076 n. 3 (2nd Cir. 1970).

oil upon which he slipped. Moreover, there was testimony that plaintiff used improper procedures in trying to lift rather than slide the plate into place. We are not prepared to find that the record is lacking in material evidence to support the jury's verdict on the "sole cause" issue.

The judgment of the district court is therefore affirmed in part and reversed in part and the action is remanded for entry of an order of dismissal.

[TRANSCRIPT OF DISTRICT COURT'S DECISION ON MOTION FOR JUDGMENT NON OBSTANTE VERDICTO DATED JULY 17, 1972]

The Court has before it really two motions. The first one is a motion for a judgment not withstanding the verdict in favor of the plaintiff concerning Plaintiff's claim for maintenance and cure. In this case, the plaintiff was employed as a seaman on the S.S. Robert McNamara until his discharge on June 28, 1968. During the course of the preparation of his discharge papers, he claimed to have been injured in a fall on April 4, 1968, and it is these alleged injuries which eventually led to the plaintiff's action against the defendant that we are concerned with here.

The plaintiff's action was in three counts: One, for negligence under the Jones Act; two, for unseaworthiness under the general maritime law; and three, for maintenance and cure. Following a lengthy trial, the jury returned a verdict of no cause for action as to the first two counts but awarded Plaintiff eight dollars a day from June 29, 1968 to June 29, 1970 for maintenance and cure. And the defendant has now made this timely motion for judgment n.o.v.

In this regard, the defendant takes two positions. First, he argues that the plaintiff offered no proof that his injury was caused while in service of the ship and that he failed to bring himself within the scope of maintenance and cure. Second, the defendant maintains that the plaintiff failed to prove he suffered from a curable disability for which he obtained curative rather than palliative treatment, and that since maintenance and cure applies only for curative treatment, the plaintiff should not have recovered.

Now, a motion for judgment notwithstanding the verdict may only be granted when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. *Rithe* versus *Saginaw,* 337 Fed 2nd 393. Here the defendant would have the Court conclude, without weighing the evidence, that the only reasonable conclusion from the evidence presented is that Plaintiff did not suffer an injury while in the service of the ship. However, there was evidence presented to the jury that some time after the fall the plaintiff suffered dizziness which was eventually diagnosed as a vestibular labyrinthine disorder. To infer from this that the fall caused the disorder is not unreasonable. Well, the Court may not have decided the same way from the facts presented, but the jury did. The fact that physical examinations immediately subsequent to the alleged fall did not detect the disorder is not conclusive of the issue since those examinations did not include certain tests which a disorder of the sort allegedly suffered here could be detected with.

For the second point, that Plaintiff's treatment was not curative but palliative in nature and therefore not within the scope of maintenance and cure, the defendant

points to the testimony of Dr. Heil, the ear specialist, who testifies that there is no known cure for the vestibular deficit suffered by Plaintiff. While it is true that maintenance and cure is not available for a sickness declared to be permanent, it is also true that maintenance and cure continues until such time as the incapacity is declared to be permanent. *Narzian* vs *Nicholson Transit Company,* 174 Fed Supp 348, an Eastern District of Michigan case decided by Judge Thornton. Let me read from that case on page 349:

> "The rule to be applied in limiting the maintenance and cure recovery is laid down in *Farrell* vs *United States,* 336 US 511. The Court there quotes from a draft convention submitted in 1936 by the General Conference of the International Labor Organization in Geneva, subsequently ratified by the Senate and proclaimed by the President effective for the United States on October 29, 1939. The provision quoted in the *Farrell* case states that maintenance and cure continues until the seaman is cured or until 'the sickness or incapacity has been declared of a permanent character.' The Court cites approvingly in this connection"—

And then cases are cited.

> "At most, recovery should not be extended beyond the time when the maximum degree of improvement to his health is reached. We can find no authority approving a longer period of recovery. Recovery of maintenance and cure should not extend beyond the time when a maximum degree of improvement in the health of an injured seaman has been reached."

Then on page 350:

> "We think that the only proper interpretation of the rule is that once the administration of curative treatment has ceased because medical science can do no more for the patient to improve his condition, then the seaman's right to maintenance and cure ceases."

Now, the Court agrees with the principal (sic) spelled out by Judge Thornton in this case. In our case, the only physician competent to testify as to the permanence of the plaintiff's incapacity was Dr. Heil, the ear specialist. Dr. Heil did not even examine the plaintiff until March 20, 1972. However, the jury did not grant maintenance and cure past June 29, 1970, almost two years before the declaration that the condition was permanent. Thus, the jury found that for the period for which a judgment was granted, the plaintiff was entitled to maintenance and cure.

Now, as I said earlier, a motion for judgment n.o.v. may only be granted when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. In the opinion of the Court, it just cannot be said that from the facts, from the testimony without weighing the credibility of the evidence, there could be but one reasonable conclusion. For this reason, I'm going to deny the motion for judgment n.o.v.

With regard to the other motion filed by the plaintiff under Rule 60(B) for relief from judgment on the grounds that the Court had been in error when it did not award Plaintiff interest on the judgment for maintenance and cure and counsel fees, on the issue of interest, the defendant argues that the plaintiff did not ask for prejudgment interest in his complaint. Defendant further argues that since Plaintiff elected to bring the action on the civil side rather than in admiralty, the plaintiff is bound by the rule that in federal cases where jurisdiction is based upon federal law rather than upon diversity, interest on a personal injury claim runs from the date of entry of judgment rather than from the date of judicial demand, citing the case of *Divernay* vs *Alcoa Steamship Company*, 217 Fed Supp 698 at page 700. While this issue arises out of a claim for maintenance and cure rather than personal injury, the same reasoning used by the Divernay Court would apply here. There the Court said and I quote:

> "In the instant case, which was predicated upon a federal statute, the Jones Act and upon maritime law, it is the opinion of this Court that Title 28, U.S. Code, Section 1961 is controlling in that interest runs only from the date of entry of judgment."

Our case also is founded on federal maritime law and was brought on the civil side. However, even if Title 28, Section 1961 does not apply to the claims for maintenance and cure, the plaintiff would not prevail. In *Rouald* vs *Cargo Carriers, Inc.*, 243 Fed Supp 629, the Court said at page 633:

> "The award of interest and attorney's fees is discretionary with the Court. That being the case, Plaintiff is incorrect in alleging, as he does, that he is entitled to prejudgment interest as a matter of law."

It follows that the Court was not in error when it declined to award interest on this judgment. Thus, Plain-

tiff's reliance on Rule 60(B) for relief from judgment on the grounds of mistake is ill founded. The same applies with regard to Plaintiff's contention that the Court was in error as a matter of law in not awarding attorney's fees. This, like the awarding of interest, is a matter for the Court's discretion. *Rouald* vs *Cargo Carriers, Inc.*, 243 Fed Supp 629.

The plaintiff has cited to the Court the case of *Jordan* vs *Norfolk Dredging Company*, 223 Fed Supp 79, which consterues *Vaughn* vs *Adkinson*, 369 US 527, on the question of whether award of attorney's fees to a plaintiff in a maintenance and cure claim was dependent on a showing of callous behavior on the part of a ship owner in withholding maintenance and cure. The Jordan Court concluded that under *Vaughn*, payment of attorney's fees was proper regardless of callousness of the ship owner. Defendant, on the other hand, has cited to the Court cases which reach exactly the opposite conclusion about *Vaughn* and hold that ship owners' callousness isn't a necessary prerequisite for the recovery of attorney's fees. *Robertson* vs *S.S. American Builder*, 285 Fed Supp 794, 1967; *Roberts* vs *S.S. Argentina*, 1964 A.M.C. 1696.

It is clear, as the Court in *Robertson* vs *S.S. American Builder* explicitly noted, that the courts have not arrived at a consistent rule with this regard. In view of this inconsistency, the Court here feels that the presence or absence of callousness is a useful factor to help the Court in the exercise of the discretion is has to award or withhold attorney fees.

In our case, it is not disputed that the ship owner withheld maintenance and cure in a good faith belief, based

upon physical examinations of the plaintiff following his fall, that the plaintiff was fit for duty. Since there is no evidence of callousness on the part of the defendant, attorney fees will not be awarded. For these reasons, Plaintiff's motion for interest and attorney fees is denied as well.